evidence as the debt itself.[7] Either theory seems sufficient to uphold a desirable result. The theory that the gift from A to B, whether for the benefit of the donee or another, if invalid at law, could be upheld on the ground that the donor had constituted himself a trustee, at one time accepted,[8] was short lived. It was declared that an intention to part with the legal title negatived the requisite intention to hold in trust.[8] It has been argued, however, that Equity thereby apparently violated two of its fundamental rules: that substance and not form shall be regarded; that what cannot be done directly will not be done indirectly.[9] To this, however, it is answered that because of its peculiar historical position Equity abdicates in favor of Law when a transfer of the legal title is involved, but assumes jurisdiction when the proposed gift is of the beneficial interest only. On the one hand, the legal sufficiency of the donor's acts is the important fact, on the other, the conscionableness of his refusal to effectuate his original intent.[9] Gifts from husband to wife, where the wife's common law disability still obtained, were sought to be upheld upon the theory that, upon delivery, title vested in the wife, but at once revested in the husband, by operation of law, impressed with the trust, however.[10] This was clearly so in the case of a gift to the wife, from a stranger. The argument, though plausible when personalty was involved, apparently failed as to realty since the divestment of an estate of freehold could only be accomplished by an act or instrument of equal solemnity with that vesting the estate.[11] It would seem that the attempted gift to the wife divested the husband of no title and that to regard him as having thereby become a self declared trustee was a manifest perversion of his intention.

In a recent Pennsylvania case, *In re Ashman's Estate* (Pa. 1909) 72 Atl. 899, the Court refused to regard a father as a trustee of bonds, for his son, upon a failure of a gift of them to the son, because of non-delivery. This reiteration of the narrow doctrine, moreover, accords with sound policy, a consideration in this class of cases.

WAIVER AND LICENSE IN CONDITIONAL ESTATES.—The rule of Dumpor's Case,[1] that a license for a breach of a condition subsequent in a lease for years completely discharges the condition, though vigorously criticised, is generally recognized as the doctrine of the common law.[2] Because of its apparent harshness, however, the courts have not hesitated to engraft exceptions to the rule.[3] Thus, it is held not to apply to a condition capable of being broken a number of times—the so-called "continuous

[7]Slade *v.* Mutrie (1892) 156 Mass. 19; Grover *v.* Grover (Mass. 1835) 24 Pick. 261.

[8]Richards *v.* Delbridge (1874) L. R. 18 Eq. 11; Milroy *v.* Lord (1862) 4 De G. F. & J. 264; *In Re* Smith's Estate (1891) 144 Pa. 428; Baltimore etc. Co. *v.* Mali (1885) 65 Md. 93.

[9]29 Amer. L. Rev. 361.

[10]Grant *v.* Grant (1865) 34 Beav. 623; Baddeley *v.* Baddeley (1878) L. R. 9 Ch. Div. 113; Templeton Adm'r. *v.* Brown *et al.* (Tenn. 1887) 5 S. W. 441.

[11]Price *v.* Price (1851) 14 Beav. 598.

[1](1603) 4 Co. 119b.

[2]Brummel *v.* Macpherson (1807) 14 Ves. 173 (Equity adopted rule of law); Macher *v.* Foundling Hospital (1813) 1 Ves. & B. 188. See also 7 Am. Law Rev. 616-640.

[3]The rule has been repudiated in Illinois: Kew *v.* Trainor (1894) 150 Ill. 150.

breach."[4] And a waiver of a breach of a condition against subletting does not discharge the condition.[5] Whether a condition against assignment is discharged by a waiver as it is by a license is a disputed question.

Any act by the lessor, after breach of the condition, that shows an election on his part to consider the lease valid and subsisting, such as acceptance of rent, is a waiver, provided the lessor has knowledge of the breach.[6] It is often difficult, however, to apply the rule to a given state of facts. Waiver differs from license in that the former takes place after breach and may be implied from the acts of the lessor, while license is express permission given before breach. As stated, the effect of a license on a condition is to destroy it,[7] and in England the same rule has been applied where the condition expressly bound the lessee and his assigns and license was given to assign to a particular person only.[7] Some authorities maintain that a different view prevails where there is a waiver.[8] This contention rests mainly on the cases of *Doe* v. *Bliss*,[9] *Macher* v. *Foundling Hospital*,[9] and *McKildoe* v. *Darracott*.[10] In *Doe* v. *Bliss*, the condition was against subletting, and it was held that a waiver of one breach did not prevent the accrual of a right of entry upon a subsequent breach. But a condition against subletting differs materially from a condition against assignment: in the one case the lessee still remains owner of the leasehold term, in the other, he parts with all his interest.[11] It does not necessarily follow, therefore, that what is true of a condition against underletting is true of a condition against assignment. It has been suggested that since a subletting implies a division of a term, the condition against subletting in *Doe* v. *Bliss* is in its nature continuous and therefore falls within the recognized exception of the continuous breach.[4] Nor is *Macher* v. *Foundling Hospital* an authority for the alleged distinction between license and waiver. There the question was whether the lessor had notice sufficient to make his acts a waiver. *McKildoe* v. *Darracott* is likewise inapplicable; the court's discussion of the discharge of conditions is mere *dictum*. The breach in the case, moreover, was by subletting and not by assignment.

On principle, any distinction between waiver and license in the application of the rule in Dumpor's Case seems illogical. A license, obviously, and a waiver, by authority,[12] both show an intention on the part of the lessor to continue the relation of landlord and tenant; and to maintain that a license shows an intention to destroy the condition, and that a waiver, merely an intention to tolerate a breach,[13] is either to distinguish the indistinguishable or to put a strained construction on the

[4]7 Am. Law Rev. 633-640; Doe *v.* Woodbridge (1829) 9 B. & C. 376; McGlynn *v.* Moore (1864) 25 Cal. 384; Crocker *v.* Old South Society (1871) 106 Mass. 489.

[5]Doe *v.* Bliss (1813) 4 Taunt. 735.

[6]Pennant's Case (1596) 3 Co. 64a; Goodright *v.* Davids (1778) Cowp. 803; Garnhart *v.* Finney (1867) 40 Mo. 449; Smith *v.* Edgewood Casino Club (1896) 19 R. I. 628.

[7]Brummel *v.* Macpherson, *supra*.

[8]1 Washburn, Real Property § 650; 1 Tiffany, Real Property § 73; 7 Am. Law Rev. 633.

[9](1813) 1 Ves. & B. 188.

[10](Va. 1856) 13 Grat. 278.

[11]Heeter *v.* Eckstein (N. Y. 1874) 50 How. Pr. 445.

[12]Marsh *v.* Curteys (1596) Cro. Eliz. 528; Rede *v.* Farr (1817) 6 M. & S. 121; Conger *v.* Duyree (1882) 90 N. Y. 594.

[13]Doe *v.* Bliss, *supra;* Taylor, Landlord & Tenant (9th Ed.) § 287.

acts of the lessor. A late California case, *German-American Bank* v. *Gollner* (1909) 102 Pac. 932, presents the issue squarely, and holds that a conditional covenant in a lease against assignment without written consent is discharged by acceptance of rent with knowledge of the breach.[14] The forced distinction between license and waiver is thus avoided and the case appears sound on principle.

The rule of Dumpor's Case is too well established to be overturned by judicial legislation. The California case however shows the need of a reformatory statute. Whatever may have been the reason for the rule originally, it does not seem right today that a lessor, who has inserted a condition in the lease to prevent an undesirable tenant being foisted upon him, should be deprived of the benefit of the condition when consideration for his tenant has kept him from enforcing a technical forfeiture. The clear intention of the parties, and not an antiquated rule of law, should govern in such cases. The desirability of a change has been recognized in England, where the rule has been abrogated by act of Parliament.[15]

[14]Murray *v.* Harway (1874) 56 N. Y. 337, accord.

[15]22-23 Vict. c. 35; 23-24 Vict. c. 38.